STATE OF MICHIGAN
IN THE SUPREME COURT

In the Matter of

BRYNN MARIAM BANKS and
GREGORY PETOSKEY-BANKS,

Minors,

Supreme Court No.

Court of Appeals No. 252617

Lower Court No. B 03 225 N

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellant,

vs.

LAFRAYE BANKS,

Respondent-Appellee,

127292

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RESPONDENT-APPELLEE'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The statement of Jurisdiction submitted in Appellant's Brief is adopted and incorporated herein by reference.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WHETHER PETITIONER/APPELLANT HAS SET FORTH SUFFICIENT GROUNDS PURSUANT TO MCR 7.302(B) FOR CONSIDERATION OF ITS APPLICATION FOR LEAVE TO APPEAL?

Respondent-Appellee answers "NO"

Petitioner-Appellant would answer "YES"

II. WHETHER THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE IF ALLOWED TO STAND?

Respondent-Appellee answers "NO"

Petitioner-Appellant would answer "YES"

The Court of Appeals would answer "NO"

The Trial Court would answer "YES"

The Referee who conducted the trial would answer "NO"

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On May 3, 2003, Brynn Banks was taken to Port Huron Hospital. (Tr Vol I p 50). The Emergency Room Doctor was advised that the child had fallen from a second story window. Brynn Banks was approximately 7 months old and weighed 17 pounds at the time of the fall. Injuries included multiple contusions and abrasions, collapsed lungs and a broken femur. (Tr Vol I p 50).

Ms. LaFraye Banks, (Brynn's mother) was also interviewed by Dr. Daniel Angeli who testified that he filled out a clinical certificate that Ms. Banks "was a danger to herself and others" and "required treatment consistent with the Michigan Mental Health Code." (Tr Vol I p 56). Dr. Angeli diagnosed LaFraye Banks as suffering from "major depression with psychotic features." (Tr Vol I p 60). He referred her for a psychiatric examination.

The petition for jurisdiction of Brynn Mariama Banks (d.o.b. 10-07-2002) and Gregory Petosky Banks (d.o.b. 04-26-1994) was filed on May 5, 2003. Trial was conducted on August 27th and September 3, 2003. LaFraye's mother testified that since March of 2003, LaFraye had been behaving in a confused and irrational manner. (Tr Vol I pg 67-72). She also testified that the screens in her rented upstairs bedroom and bathroom were torn or in poor condition and had not been repaired despite her requests for repair. (Tr Vol I p 82). She also testified that immediately after the incident in which Brynn fell out of the window, LaFraye told she had been holding Brynn child when she suddenly reared back and fell out of the window. (Tr Vol I p 94). That was consistent with Brynn's "rearing back" while being held on other occasions. (Tr Vol I p 95).

The responding Police Offer, Scott Pike, testified that the marks in the dirt under the window indicated that the child landed 29-1/2 inches from the wall of the first floor. (Tr Vol I p 26). The second story overhung the first floor by six to eight inches. (Tr Vol I p 35). This was not taken into consideration by Officer Pike or by Judge Brown in his review. Therefore, the second storey window has an actual distance of 21-1/2 - 23-1/2 inches from the wall. Office Pike also testified that the screen was partially out of the window and the Venetian blinds were laying on the vanity. (Tr Vol I pg 29, 32).

Counsel for LaFraye Banks called several witnesses. Their testimony is found in Volume II of the Transcript. Caroline Combs, a Group Home Supervisor for Community Mental Health, testified that Ms. Banks was in her program for two months and completed it satisfactorily. (Tr Vol II pg 11,12). Amy Kendall, a clinical case manager at the Day Treatment Program that LaFraye was enrolled in after her group home discharge, testified that LaFraye had progressed to the point where she was ready to be discharged to aftercare which would consist of regular therapy sessions. (Tr Vol II p19). She further testified that LaFraye had been living at home since July 7, 2003. (Tr Vol II p 20).

Geneva Livingston, LaFraye's aunt, testified that prior to the incident, LaFraye's children were always clean, well feed and healthy. (Tr Vol II p 27). This was reiterated by Kathy Carey (Tr. Vol II p 32) and Hillary McClung who testified that LaFraye was very good in her ability to nurture and care for her children. (Tr Vol II p 39). Additional witnesses provided what could be fairly described as cumulative testimony.

LaFraye Banks testified that she was previously employed full time. (Tr Vol II p 94). She indicated she was sole custodial parent of both children. (Tr Vol II p94). She had potty trained her oldest, and enrolled him in school where he was a straight "A" student. She had earned an Associates Degree and had gotten her children their regular vaccinations. (Tr Vol II p 95, 96). She testified that she has not used controlled substances or had no criminal record. (Tr Vol II p 129). She acknowledged their was a pending charge against her arising out of this same incident. (Tr Vol II pg 129-130). She was later acquitted of those charges. She also testified that she would comply with any court directives, continue treatment and seek employment. (Tr Vol II p 134).

The issue of the Venetian blinds appears to be substantial. As previously indicated, Officer Pike testified that the Venetian blinds were found across the vanity sink. (Tr Vol I p 29). LaFraye's mother testified that the blinds often fell because the brackets were broken. (Tr Vol I p 83). The brackets were so bad the wind would often blow them down. Mrs. Banks testified she would usually put the blinds on top of the sink when they fell down. (Tr Vol I p 83). LaFraye testified she had seen the blinds in that position before. (Tr Vol II p 150). The photograph of the sink and blinds clearly show the sink can still be used without moving the blinds from the sink.

(Exhibits 5 & 6). LaFraye testified adamantly and repeatedly that she did not take the blinds down. They were down already. (Tr Vol II p 146).

The trial was conducted before Referee Shane Burleigh. The Referee found that the requirements of 712A.19b(3)(b)(I) had not met. See Referee's Opinion attached in its entirety as Exhibit 1. Specifically, the Referee at pg 4-5 concluded as follows:

> "Brynn Banks sustained very serious injuries in this case. The Court finds that the actions of the parent were neglectful in causing the injuries. The evidence clearly shows that the injuries sustained by the child were directly connected to respondent's mother's mental health problems at the time. This conclusion is reached because respondent mother by all accounts, by all testimony presented at trial, was very responsible and appropriate mother to her son, Gregory, for nine years prior to this incident. Her family and friends suddenly began noticing that she was acting strangely in March 2003, and the incident in questions occurred May 3, 2003. The diagnosis at Port Huron Hospital was major depression with psychotic episode.
>
> Ms. Banks was initially hospitalized, then placed in the Lincoln Group Home and the Lakeshore Day Treatment Program, and was then released home. The evidence at trial established that her progress and mental health treatment has been good and she has successfully completed every phase of that treatment. Respondent mother appeared stable, and based upon the testimony at trail, she is not a threat to herself or her children at this time. For all of these reasons, the Court cannot conclude that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. Based upon respondent mother's progress and mental health treatment the grounds for termination in section MCL 712A.19b(3)(b)(I) have not been established by clear and convincing evidence. For these reasons, the recommendations of the referee is that the parental rights of respondent mother, LaFraye Banks, not be terminated. A hearing will be scheduled for purposes of entering appropriate dispositional orders."

The FIA, represented by the St. Clair County Prosecutor, appealed for a review by Probate Court Judge Elwood Brown.

Judge Brown found in his opinion, attached in its entirety as Exhibit 2, as follows:

"There was testimony in this case that the respondent was suffering from some obvious mental incapacity. She was examined at the hospital and referred to a hospital psychiatrist. After initial hospitalization, she was in a group home for a period of time and then a Day Treatment Program and then released to home on medication. There was no testimony at the trial that the actions of the respondent in throwing her child out the window of the second story of this building was a direct correlation or result of some mental illness.

Unlike the referee who found that the parent was neglectful in causing the injuries, this Court in review of the testimony is firmly convinced that the injuries to this child were not as a result of neglect but more as a result of an intentional act on the part of the parent to seriously injure or kill this child. As a result, this Court is left with a firm conviction that the child has suffered a physical injury and that the parent's act caused that physical injury and that because the parent intentionally tried to seriously injure or kill Brynn Banks the Court is left with the firm belief that there is a reasonable likelihood that the child will suffer injury or abuse in the future if left with the respondent mother". (Judge Brown Opinion at p 3).

The Court of Appeals reversed Judge Brown's decision finding an absence of clear and convincing evidence in support of the required statutory basis for termination of parental rights. Specifically, the Court of Appeals found no clear and convincing evidence to support Judge Brown's conclusion that LaFraye would likely harm the child in the foreseeable future if returned to her care. The Court of Appeals opined:

"Our review of the record, however, indicates that the trial court's conclusions were not based on clear and convincing evidence that the injury was unrelated to respondent's mental illness. Rather, they were based on a perceived ***absence*** of evidence relating to this issue. We agree with the referee's conclusion that the fall was the result of respondent's mental illness. Moreover, the trial court's further conclusions that respondent intentionally threw her child out the window for a reason other than mental illness and, thus, would likely harm the child again in the future are not supported by ***clear and convincing*** evidence in the record, as required under the statute. Without clear and convincing evidence that respondent was likely to harm the

children in the future, the statutory ground for termination was not supported and the trial court erred in terminating respondent's parental rights. MCR 3.977(G); ***In re Miller***, 433 Mich 331, 337; 445 NW2d 161 (1989). (Emphasis theirs).

Petitioner now seeks leave to appeal that decision.

ARGUMENT

I. APPELLANT HAS FAILED TO SET FORTH SUFFICIENT GROUNDS PURSUANT TO MCR 7.302(B) IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL.

While not argued or cited specifically the only arguable ground for Appellant's application is MCR 7.302(B)(5). This section provides that Appellant's application must show that . . .

> (5) in an appeal from the Court of Appeals, the decision is clearly erroneous ***and*** will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. (Emphasis added).

No decision of this Court appears to be in direct conflict with the Court of Appeals decision in this case. Petitioner-Appellant appears to argue on page 12 of its brief that two prior decisions of the Court of Appeals are in conflict with the decision in this case. The cases relied upon by Appellant are ***In re Arntz***, 125 Mich App 634; 336 NW2d 848 (1983) and ***In re Martin***; 167 Mich App 715; 423 NW2d 327 (1988). Both cases are easily distinguished from this case and clearly do not present conflicting opinions by the Court of Appeals as contemplated by MCR 7.302(B)(5).

In re Arntz, supra is relied upon by Appellant for the proposition that "A petition need not enumerate every theory or argument in support of Family Division jurisdiction." (Appellant's Brief p 12). In ***In re Arntz,*** the appellants claimed as error on appeal the petition initiating the proceedings was legally insufficient. The appellants objected that the probate court failed to specifically tailor its finding of fact in the opinion to fit within the language of the statutory provisions for termination. The Court of Appeals found this objection to be without merit and that a petition need not enumerate every theory or argument that might be employed by the state. ***In re Arntz***, 336 NW2d at 851. Respondent/Appellee made no such claim here. Moreover, the Court of Appeals decision below did not create a conflict with ***In re Arntz*** by stating the probate court must now enumerate specifically all theories or arguments to be employed by the state. Only then would a true inconsistency exist which needed clarification by this Court.

The analysis in ***In re Martin, supra***, is similar. ***Martin*** is cited by Appellant for the proposition that "Nor must the petition disprove every possible innocent explanation for an alleged injury." (Appellant's Brief p 12). In ***In re Martin***, the question before the court was whether, in retrospect, the court can determine if the jury's verdict in the case was against the great weight of the evidence. At trial, several doctors testified the child's injury was the result of abuse, and not a medical disorder. Subsequent to the trial, substantial medical/expert testimony suggested the injury to the child was not the result of parental abuse, but rather caused by a natural medical deficiency. Despite this evidence the probate court continued to retain jurisdiction over the parents' objection. The court of appeals refused to find the jury verdict against the great weight of the evidence because the trial court testimony had not been completely refuted. Therefore, the court continued the **temporary** jurisdiction over the child. This was not a termination case. The Court of Appeals decision in this case clearly does overrule by implication or conflict in anyway with ***In re Martin***, 167 Mich App 715; 423 NW2d 327 (1988).

If no conflicting decisions exist, the only remaining ground is whether "the decision is clearly erroneous **and** will cause material injustice". MCR 7.302(B)(5). (Emphasis added). As Appellant devotes substantial time to the clearly erroneous issue in its brief, that argument will be addressed subsequently in this brief in Argument II. Whether the Court of Appeals decision will cause material injustice if allowed to stand will be addressed here.

The effect of the Court of Appeals decision is to allow the Family Division of the Probate Court to retain temporary jurisdiction of the minor child and work toward unification of the children with their mother. Clearly, LaFraye Banks will be required to comply with all Orders of the court in that process and demonstrate to the court her mental health issues have been or are continuing to be treated effectively and are under control. She indicated her willingness to do so when she testified during the trial and continues to be willing to do today and is, in fact, doing so since the Court of Appeals' decision. (See Dispositional Order attached as Exhibit 3 dated 10/28/04 following Court of Appeals decision).

It cannot go unnoticed that prior to this incident LaFraye Banks had been an excellent mother to both of her children. This fact was uncontroverted. In March 2003 she began to show

signs of a mood disorder and unusual behavior which appeared to worsen leading up to this incident. Despite her mental condition no one testified that LaFraye was neglecting her children, abusing her children or acting out in any way against her children. The only difference between then and now was her mental health condition at the time of this incident. If LaFraye Banks cannot demonstrate to Judge Brown in the Family Court that her mental health is stable and that she can comply with the court's directives unification might not occur. How can a decision of the Court of Appeals which results in that kind of disposition be materially unjust? The answer is clear, it simply is not.

The grounds which must be shown by Appellant for consideration of its Application for Leave to Appeal have not been established. The application should be denied.

II. THE DECISION OF THE COURT OF APPEALS IS NOT CLEARLY ERRONEOUS AND WILL NOT RESULT IN MATERIAL INJUSTICE IF ALLOWED TO STAND.

Appellant's argument throughout this entire case has been based upon one theme. That theme has been that Brynn Banks' fall was an intentional, deliberate act committed for the purposes of killing or seriously injuring the child. In this case, the Family Independence Agency is represented by the St. Clair County Prosecutor's Office. Contemporaneously with the filing of the petition to terminate LaFraye Banks' parental rights the St. Clair County Prosecutor's Office charged her criminally under a two count complaint, Count I being Assault with Intent to Murder and Count II being Child Abuse, First Degree. LaFraye testified in the termination trial she was contesting those charges. (Tr Vol II pg 129-130). On March 3, 2004 LaFraye Banks was acquitted by a St. Clair County jury on both counts. She had no criminal record at the time of the trial in this matter and continues to have no criminal record.

Referee Burleigh, who conducted the trial in this matter, was also not persuaded by the prosecutor's and FIA's claim this was an intentional, deliberate act. Referee Burleigh concluded from the testimony and other evidence "the actions of the parent were neglectful in causing the injuries. The evidence clearly shows that the injuries sustained by the child were directly connected to respondent mother's mental health problems at the time." (See Referee's Recommended Findings at p 4-5). Referee Burleigh further opined:

> This conclusion is reached because respondent mother by all accounts, by all testimony presented at trial, was a very responsible and appropriate mother to her son, Gregory, for nine years prior to this incident. Her family and friends suddenly began noticing that she was acting strangely in March 2003, and the incident in question occurred May 3, 2003. The diagnosis at Port Huron Hospital was major depression with psychotic episode.
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> Ms. Banks was initially hospitalized, then placed in the Lincoln Group Home and the Lakeshore Day Treatment Program, and was then released home. The evidence at trial established that her progress and mental health treatment has been good and she has successfully completed every phase of that treatment. Respondent mother appeared stable, and based upon the testimony at trial, she is not a threat to herself or her children at this time. For all of theses reasons, the Court cannot conclude that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. Based upon respondent mother's progress and mental health treatment the grounds for termination in section MCL 712A.19b(3)(b)(I) have not been established by clear and convincing evidence. For these reasons, the recommendation of the referee is that the parental rights of respondent mother, LaFraye Banks, not be terminated. A hearing will be scheduled for purposes of entering appropriate dispositional Orders. (Referee Opinion, Exhibit 1, pg 4-5).

Judge Brown dismissed LaFraye's mental condition as having any role in the incident, although he does acknowledge the evidence in his opinion. He reversed the findings of the attorney/referee concluding that LaFraye Banks deliberately threw her child out the window intending to kill her or cause serious injury. He makes this finding despite the overwhelming and uncontroverted testimony that LaFraye Banks was an excellent, caring mother with no criminal history whatsoever. He makes this finding despite the uncontroverted facts that LaFraye Banks was continuing to provide for and care for her children during her recent depressive episodes and other unusual behavior. (Tr Vol II p 107). He makes this finding without any evidence of hostility, aggression, disdain, dislike or apathy toward her daughter, Brynn Banks. Despite this evidence he goes on to find that LaFraye Banks removed the mini blind from the window and used the screw driver to pry out the rubber rope-like material used to hold the screen in place and

then threw her child from the window. He makes this finding despite LaFraye Banks' repeated testimony she did not remove the blinds and that she did not know who removed them or why they were down. (Tr Vol II p 107). He makes this finding without any direct evidence that LaFraye Banks handled the blinds or the screwdriver, or that she even knew the screwdriver was there. Clearly, Judge Brown chose not believe LaFraye Banks but he never articulated why.

This case arises out of a single incident of alleged abuse or neglect. It is clear from the record it occurred at a time when mother, LaFraye Banks, was experiencing depression and exhibiting unusual behavior. Judge Brown acknowledged the testimony and subsequent treatment in his opinion, but he seems to be applying or requiring some *criminal insanity type burden* be met before he considers LaFraye's uncontroverted mental health condition. He then concludes there was no direct correlation that mental illness caused LaFraye to throw her child out the window. In any event, notwithstanding these depressive episodes, LaFraye Banks was continuing to act responsibly and appropriately in caring for the needs of her children while attempting to cope with her condition. (Tr Vol II p 107). The record is devoid of any evidence that LaFraye Banks was acting out against her children or that her depression or unusual behavior suggested any possible threat of imminent harm to her children. Her conduct immediately following the child going through the window is totally appropriate and consistent with an accident, and not consistent with an intentional act. Immediately after the fall LaFraye Banks ran downstairs screaming and crying exclaiming to her mother the baby fell out the window. She immediately went outside and picked the baby up and brought her inside. After a quick examination, by both LaFraye and her mother, they took the baby to the hospital for further examination. This is not the conduct of someone that deliberately caused injury to her child and who is likely to cause injury to her child in the foreseeable future. (Tr Vol II pg 116-117). This conduct is consistent with a neglectful act compromised by mental illness.

There appears to be no question that LaFraye Banks' mental illness/depression or paranoia contributed to this accident. It did not compel it to happen, which seems to be Judge Brown's difficulty. No one suggested at trial her mental condition made her throw her child out the window. Even though the petition for termination appears to make that allegation, Petitioner offered no proof in support of that allegation. The referee noted in his Recommended Findings

of Fact and Conclusions of Law that the petition for termination alleged the incident "appears to be intentional due to respondent mother's unstable mental health." (Referee Opinion, Exhibit 1, p 2). This allegation suggests LaFraye Banks had and continues to have a mental condition that prevented her at the time and will prevent her in the future from discharging her responsibilities as a parent. If that is the case, one would expect petitioner would present evidence of a debilitating mental illness. Yet, Petitioner presented no evidence in support of such a position and now argues mental illness was not a factor. The only medical witness offered by Petitioner was Dr. Daniel Angeli, the ER physician at Port Huron Hospital. Dr. Angeli was called by Petitioner to establish the injuries suffered by the child and to give a mental health diagnosis. He diagnosed that LaFraye Banks was suffering from "major depression with psychotic features" and he referred her for a psychiatric examination. Subsequently, LaFraye was hospitalized in the psychiatric ward for one week, then referred out for on-going mental health treatment which included medication and therapy for her mental health condition. (Tr Vol II pg 118-125).

Despite Petitioner's claim, an accidental theory is not inconsistent with LaFraye's mental health condition. Her mental state caused her to be distracted and preoccupied with something that may or may not have been real. She believed someone had been following her for several days. (Tr Vol II pg 103, 113). It caused her to place herself and her child in a position next to an open window increasing the chances of an accident because of her preoccupation with activity outside, but it was not the direct and sole cause of the fall.

Immediately following this incident LaFraye Banks started to receive the mental health treatment she needed. She was totally compliant and progressed normally with her treatment. There was no testimony from any witness that LaFraye Banks was not going to be able to meet her parental responsibilities in the foreseeable future. She was taking anti-depression mediation on her own under the supervision of Community Mental Health and her treating psychiatrist. (Tr Vol II p 124). Prior to the incident, LaFraye Banks never had the benefit of mood stabilizing medications and prior to March 2003 she had not experienced any severe mental health problems. The evidence on the record is clear. The mental health treatment plan was working. Amy Kendall testified LaFraye Banks was not a harmful threat to herself or anyone else. (Tr Vol II p 20). This testimony was undisputed.

Judge Brown totally dismisses LaFraye's mental state as a contributing factor in this incident. Yet, he proceeds to find that LaFraye Banks is reasonably likely to injure her children in the foreseeable future. His finding is not based upon any criminal history, prior FIA cases, testimony of bad parenting, or medical opinion suggesting possible uncontrolled spontaneous behavior which could result in harm. It is solely based upon his finding the fall was the result of intentional conduct to injure or kill. That evidence is circumstantial at best and fails to meet the clear and convincing standard. Judge Brown failed to consider the second floor overhang when he concluded the child fell 29.5 inches from the wall. The actual distance from the window/wall is considerably less, some 6 - 8 inches less according to the testimony, making the distance only 21 - 23 inches. (Tr Vol II p 35). He obviously rejected the testimony of LaFraye Banks and must have concluded she was lying, but Judge Brown failed to articulate why she was not credible. There is simply no credible evidence on the record that LaFraye Banks handled the mini blinds or placed the blinds across the sink.

Appellant goes to great lengths in its brief to cite and argue testimony given by LaFraye Banks concerning the location of the blinds just prior to the fall. The question of whether the blinds "blocked" or "impeded" the use of the bathroom sink for purposes of running water and washing one's hands appears to be the issue relied upon by Petitioner-Appellant in support of its entire case. On cross-examination LaFraye Banks adamantly denied she removed or handled the blinds. (Tr Vol II pg 143-149). However, the prosecutor kept hammering away on the location of the blinds across the sink suggesting that it would block or prevent someone from using the sink. LaFraye was consistent in her testimony the location of the blinds was not a problem in using the sink. (Tr Vol II pg 143-149). Then the prosecutor asked her a compound question which is found on pg 149, Vol II of the transcript. The question was not objected to by LaFraye's counsel. It should have been. The question was:

> Q. Ma'am. You testified that you used the sink and there was nothing across the sink to impede you from using; is that ***correct***? Those blinds were not on the sink, ***correct***" (Emphasis added).

LaFraye answered:

A. ***Correct***. (Emphasis added).

Clearly, two questions were asked before she could answer, both using the word "correct" as part of the question. No where else on the record can appellant make any attempt to support its argument that LaFraye handled the blinds, except here. It just does not exist. The entire argument is without merit and not supported on the whole record.

Exhibits 5 and 6 clearly show one can use the sink and wash their hands, so they do not "block" or "impede" use of the sink. LaFraye immediately ran downstairs hysterically and crying exclaiming to her mother the baby just feel out the window. She immediately went to the hospital. (Tr Vol II p 144). She never returned to the bathroom and never placed the blinds on the sink at a later time. They were on the sink before she ever entered the bathroom. Appellant's reliance upon this testimony is far reaching and a gross mis-characterization of the evidence based upon the whole record.

LaFraye Banks made a mistake in handling the baby so close to an open window. She made a mistake in attempting to turn the baby around while at the window. (Tr Vol II p 114). She was preoccupied with someone outside she thought was watching and following her and not paying enough attention to the child. While there may be some evidence on the record to support Judge Brown's findings, that evidence is not clear and convincing.

Evidence is clear and convincing when it

> "Produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issues." ***In re Martin,*** 450 Mich 204, 227; 538 NW2d 399 (1995).

Judge Brown's decision to terminate LaFraye Banks' parental rights is not based on clear and convincing evidence. The Court of Appeal was correct to reverse that decision. The Court of Appeal decision is not clearly erroneous and will not result in material injustice if allowed to stand.

RELIEF REQUESTED

For all of the reasons stated above Appellee requests that this Honorable Court deny Appellant's Application for Leave to Appeal and allow the Court of Appeals decision to stand.

Respectfully submitted,

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Dated: November 10, 2004